

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT R. SCHULER, JR.)	
Claimant)	
VS.)	
)	Docket No. 204,130
SCHOCK TRANSFER COMPANY, INC.)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY COMPANY)	
Insurance Carrier)	

ROBERT R. SCHULER, JR.)	
Claimant)	
VS.)	
)	Docket No. 204,131
CROOKS DRIVER LEASING)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	

ORDER

On October 17, 1996, the applications of claimant, respondent Schock Transfer Company, Inc., and respondent Crooks Driver Leasing, for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on August 14, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, John G. O'Connor of Kansas City, Kansas. Respondent Schock Transfer Company, Inc. and its insurance carrier, Hartford Accident & Indemnity Company appeared by and through their attorney, Mark J. Hoffmeister of Overland Park, Kansas. Respondent Crooks Driver Leasing and its insurance carrier, Aetna Casualty & Surety, appeared by and through their attorney Rex W. Henocho of Lenexa, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board with the addition that the deposition of Richard James Maurer taken May 20, 1996, is also included in the record considered by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Claimant raised the following issues on appeal:

- (1) Whether claimant is entitled to 10.57 weeks temporary total disability compensation for the period July 20, 1995, through October 1, 1995.
- (2) Claimant's entitlement to future medical treatment.

Respondent Schock Transfer Company, Inc., raises the following issues in Docket No. 204,130:

- (1) Whether K.S.A. 44-501 should apply and respondent should be entitled to a reduction in claimant's preexisting functional impairment.
- (2) Whether the employer/employee relationship existed between claimant and Schock Transfer.

Respondent Crooks Driver Leasing appealed the following issues in Docket No. 204,131:

- (1) Whether the parties are covered by the Workers Compensation Act and whether Crooks Driver Leasing and its

insurance carrier are subject to the jurisdiction of the Kansas Workers Compensation Act.

- (2) Whether K.S.A. 44-501 should apply and respondent should be entitled to a reduction in claimant's preexisting functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, Robert R. Schuler, Jr., was injured on April 3, 1995, in Jackson County, Missouri while driving a truck. Claimant sustained injury to his low back while moving a steel dock plate between his truck and the dock to unload his truck. At the time of the accident claimant felt a soreness in his back which he described as a stinging sensation. Later, while unloading the truck with a hand jack claimant noticed his back was sore, and even later that same day as he stepped down from the cab at his next stop, he felt a sharp, severe pain in his lower back. Claimant immediately advised his supervisor, Dennis Hooper, at the dispatch trailer in Missouri that he had injured his back lifting the dock plate. Claimant underwent a series of examinations and treatments ultimately resulting in surgery on August 25, 1995, under the care of Dr. Frank Holladay. Claimant's last employment with Schock and/or Crooks was July 19, 1995. As of the regular hearing claimant had returned to truck driving and it is stipulated that he is earning a comparable wage.

Claimant alleges entitlement to 10.57 weeks temporary total disability compensation for the period July 20, 1995, through October 1, 1995. In proceedings under the Workmens Compensation Act the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 44-501 and K.S.A. 44-508(g). The Administrative Law Judge found that the medical evidence was insufficient to prove claimant's entitlement to temporary total disability compensation during the period alleged. A review of the evidence fails to uncover information sufficient to reverse this finding. As such, the Appeals Board finds that the decision by the Administrative Law Judge denying claimant temporary total disability compensation during this period should be, and is hereby, affirmed.

Claimant further requests entitlement to future medical care upon application to and approval by the Director. Dr. Frank P. Holladay, in performing surgery on claimant's back, apparently provided very competent medical treatment. The surgical result was described by the Administrative Law Judge as "egregious" which indicates claimant had a very positive result from the surgery. There was no recommendation for additional treatment, but the Appeals Board questions how a surgery of this severity can result in perfect results

with no need in the future for any medical care. As such, the Appeals Board finds that claimant is entitled to additional medical treatment upon application to and approval by the Director.

These cases were consolidated for hearing, per the stipulations of the parties, as they involved the same claimant and the same accidental injury. In considering whether either respondent Crooks or respondent Schock are entitled to credit for a previous functional impairment under K.S.A. 44-501, the Appeals Board must consider the specific language in question. K.S.A. 44-501(c) states in part:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

K.S.A. 44-510e(a) defines functional impairment as follows:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein."

It was acknowledged that claimant had a preexisting synovial cyst in his spine which was partially responsible for his surgery. Dr. David A. Tillema an orthopedic surgeon felt that "ninety percent (90) of claimant's impairment can be attributed to a preexisting nonoccupational disorder, i.e., the synovial cyst."

While Dr. Tillema does indicate 90 percent of claimant's current impairment is attributable to this preexisting cyst, there is no evidence claimant had any preexisting symptomatology. In fact, claimant's testimony is that he was asymptomatic prior to the date of accident of April 3, 1995. In order for either respondent to be entitled to a reduction in claimant's preexisting functional impairment it must first be determined claimant had a preexisting "functional impairment." It is acknowledged that claimant had a preexisting asymptomatic synovial cyst. There is no medical evidence to indicate that the cyst resulted in a loss of a portion of the claimant's total physiological capabilities prior to the accident of April 3, 1995. As such, the Appeals Board finds the evidence is insufficient to allow a reduction in claimant's functional impairment as is requested by respondents Crooks and Schock. Therefore, the Appeals Board finds neither respondents Crooks nor Schock are entitled to a reduction in functional impairment under K.S.A. 44-501.

The Appeals Board must next decide whether it has jurisdiction over respondent Crooks Driver Leasing and its insurance carrier Aetna Casualty & Surety, for the accident occurring on April 3, 1995. It is acknowledged that the accident occurred in Missouri. The record clearly indicates that Crooks Driver Leasing was not a Kansas Corporation and did

not have its principal place of business in Kansas. The arrangement between Schock and Crooks was one of contract. The arrangement stems from an addendum to the union contract between Schock and Teamsters Union Local #41. This addendum was voted on and agreed to by the parties with the final act necessitated to create the contract being performed at the Teamster hall in Missouri.

K.S.A. 44-506 states in part:

“ . . . *Provided*, That the workmen’s compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides”

As was stipulated, the accident occurred in Missouri. Also the evidence indicates the final act to complete the contract occurred in Missouri. The Appeals Board finds, for purpose of the liability of Crooks Driver Leasing and its insurance carrier, no Kansas jurisdiction exists. Having so found, the Appeals Board dismisses the claims against Crooks Driver Leasing and its insurance carrier, Aetna Casualty & Surety Company.

The Appeals Board must next decide whether respondent Schock Transfer Company, Inc., and its insurance carrier Hartford Accident and Indemnity Company had an employer/employee relationship with claimant for purpose of assessing liability under the Workers Compensation Act.

Claimant was originally hired by Schock Transfer Company, Inc., as an employee, in 1984. This relationship continued until approximately 1992 when the responsibility for supervising and training all drivers was transferred to Crooks Driver Leasing in Missouri. Evidence of this relationship was contained in the deposition of Joe Emery Middleton in the form of a contract addendum between Crooks, Schock and the Teamsters Union Local #41. In the terms of the contract it is stated on more than one occasion that both Schock and Crooks agree to be “joint employers” under the agreement. Crooks agreed to maintain in effect all existing practices, policies or other terms of the bargaining agreement which was entered into between the Union and Schock. It was acknowledged that Crooks would be the primary employer for all purposes, and in the event that Crooks fails to carry out the terms of the contract, then Schock agreed to be bound by the terms and conditions of the agreement. The contract also specified that both Crooks and Schock would be jointly and separately bound to the conditions of the agreement.

“In Kansas an employee may have two employers, and in the event of personal injury covered by the workmen’s compensation act, the employee may look to either one or both of his employers for compensation in accordance with Mendel v. Ft. Scott Hydraulic Cement Co., 147 Kan. 719, 78 P.2d 868; ” Drennon v. Braden Drilling Co., Inc., 207 Kan. 202, 206, 483 P.2d 1022 (1971).

As the contract between Crooks, Schock, and Teamsters Union Local #41 clearly sets out that both Crooks and Schock shall be "joint employers" and as the law in Kansas does not prohibit the employee from proceeding after one or both co-employers, the Appeals Board finds the request by Schock to dismiss this matter for failure to prove an employer/employee relationship between claimant and Schock Transfer Company, Inc., to be inappropriate and said request is denied. The Appeals Board further finds claimant is entitled to an award for the injuries suffered on April 3, 1995, to his low back against Schock Transfer Company, Inc., and its insurance carrier, Hartford Accident & Indemnity Company. Any dispute between Schock and Crooks regarding what, if any, potential reimbursement will be due and owing to Schock from Crooks is a matter to be decided in a court of appropriate jurisdiction. The Workers Compensation Appeals Board is obligated to interpret the terms of the contract in order to determine what, if any, benefits may or may not be due to an injured employee. The issues as to the contractual relationships between the two respondents and their various insurance carriers are not matters over which the Workers Compensation Appeals Board retains jurisdiction.

The respondent Schock has requested that the deposition of Richard Maurer taken on May 20, 1996, be excluded from the record. The attorney for respondent Schock argues that the deposition was never completed nor signed by the claimant and the attorney for Schock was deprived of the opportunity to conclude his questioning of the witness. A review of the transcript of that deposition fails to uncover any objection by the attorney for Schock Transfer Company, Inc., to the inclusion of that document in the record. It is also noted the submission letter of Schock Transfer dated July 1, 1996, and filed with the Division of Workers Compensation on July 3, 1996, specifically lists the deposition of Richard James Maurer as part of the evidentiary record. In addition, respondent Schock Transfer argues facts from that deposition in the body of its submission letter.

It is further noted the issue regarding the requested exclusion of this transcript from the record was not brought before the Administrative Law Judge. K.S.A. 1994 Supp. 44-555b(a) states:

"The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

The Appeals Board has found in prior cases that it will not consider issues first raised before the Appeals Board nor will it consider evidence presented for the first time before the Appeals Board. For the above reasons, the request by Schock to exclude the deposition of Richard James Maurer from the evidentiary record is denied.

Additional issues dealing with whether claimant's accidental injury arose out and in the course of his employment, notice, and whether a causal relationship existed between the accident and the conditions ultimately treated, were decided by the Administrative Law Judge and not appealed to the Appeals Board. The attorneys stipulated at oral argument

that these matters were not before the Appeals Board and acknowledged the decisions by the Administrative Law Judge with regard to these issues to be appropriate. As such, the Appeals Board affirms the findings and conclusions made by the Administrative Law Judge which were not specifically appealed to the Workers Compensation Appeals Board as though specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated August 14, 1996, should be, and is hereby, modified and claimant Robert R. Schuler, Jr., is denied an award against respondent Crooks Warehouse of Kansas City, Inc., d/b/a/ Crooks Driver Leasing, and its insurance carrier Aetna Casualty & Surety for an accidental injury sustained on April 3, 1995. Award is granted to the claimant against the respondent Schock Transfer Company, Inc., and its insurance carrier, Hartford Accident & Indemnity Company for an injury occurring on April 3, 1995.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robert R. Schuler, Jr., and against the respondent, Schock Transfer Company, Inc., and its insurance carrier, Hartford Accident & Indemnity Company, for an accidental injury which occurred April 3, 1995, and based upon an average weekly wage of \$766.04 for .43 weeks of temporary total disability compensation at the rate of \$319 per week or \$137.17, followed by 70.55 weeks of permanent partial compensation at the rate of \$319, per week in the amount of \$22,505.45, for a 17% permanent partial general body disability, making a total award of \$22,642.62, which is ordered paid in one lump sum minus any amounts previously paid.

Claimant is denied entitlement to additional temporary total disability compensation per the terms of this award. Credit under K.S.A. 44-501 for preexisting functional impairment is denied to the respondent and its insurance carrier per the terms of this award.

Claimant is entitled to future medical treatment upon application to and approval by the Director.

Medical expenses in the amount of \$16,336.78 are awarded to be paid by respondent Schock Transfer Company, Inc., and its insurance carrier Hartford Accident & Indemnity Company.

The costs of the transcripts in this record as assessed against the respondent Schock Transfer Company, Inc., and its insurance carrier Hartford Accident & Indemnity Company as follows:

Metropolitan Court Reporters, Inc.

\$800.94

William V. Denton & Associates

Unknown

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Kansas City, KS
Mark J. Hoffmeister, Overland Park, KS
Rex W. Henoch, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director